No. 80204-1

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,
Respondents/Cross-Appellants,

v.

THE CITY OF SEATTLE,
Respondent/Cross-Respondent,

v.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20,
Respondents, and

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK,
Appellants.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS LANE, *et al.* ("RATEPAYERS") ON CROSS-APPEAL

ORIGINAL

David F. Jurca, WSBA #2015
Jennifer S. Divine, WSBA #22770
Connie K. Haslam, WSBA #18053
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Ratepayers Lane, *et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Ordinances

The Ratepayers reply as follows to Seattle's brief submitted on December 20, 2007 in response to the Ratepayers' cross-appeal.[1]

I. INTRODUCTION

We first address a preliminary argument made by Seattle which the Ratepayers submit is not properly before the Court on this appeal and thus should be stricken from Seattle's brief. However, the Court does not need to reach this issue at all, unless it reverses the trial court judgment against Burien and Lake Forest Park and concludes that fire hydrant costs should be paid by utility ratepayers instead of the governmental entity responsible for fire protection. Next, we turn to the two issues that are properly before the Court on the Ratepayers' cross-appeal.

II. ARGUMENT

A. Seattle's Request to Reverse the Judgment against It for Pre-2005 Fire Hydrant Costs, if Burien and Lake Forest Park Prevail on Their Appeals, Is Not Properly before the Court.

The trial court entered judgment requiring Seattle's general fund to reimburse SPU (the City's proprietary water utility) for fire hydrant costs incurred prior to January 1, 2005, and requiring SPU in turn to make refunds to water ratepayers for those costs. The trial court also entered

[1] In this reply we refer to Seattle's brief on cross-appeal as "Sea. Br." Seattle's earlier brief, submitted in response to the appeals of Burien and Lake Forest Park, is cited as "Sea. Resp. to Bur./LFP." The Ratepayers' earlier brief, submitted in response to the appeals of the two appellant cities and in support of the cross-appeal, is cited as "Ratepayers' Opening Br."

judgment in favor of Seattle on its claims against Burien and Lake Forest Park, and against Seattle on its claims against Shoreline, King County and the Fire Districts serving the suburban jurisdictions. Burien and Lake Forest Park have appealed from the judgment against them in favor of Seattle, and the Ratepayers have cross-appealed from the trial court judgment insofar as it (1) failed to award 12% statutory interest on the refunds for pre-2005 costs, and (2) upheld the validity of the January 1, 2005 tax rate increase. Seattle has not appealed from any aspect of the trial court judgment and has not assigned error to any trial court rulings.

In its brief responding to the appeals of Burien and Lake Forest Park, Seattle has offered a number of persuasive reasons why those appellants' arguments should be rejected and why its third-party judgment against them should be affirmed. However, in its response to the Ratepayers' cross-appeal Seattle argues that the Ratepayers' judgment against it should be reversed if the Court agrees with Burien and Lake Forest Park that utility ratepayers should pay for fire hydrant costs. Sea. Br. at 6-10. Seattle's argument is legally erroneous, and the issue it addresses is not properly before the Court on this appeal or cross-appeal. Accordingly, the Ratepayers request that that portion (pages 6-10) of Seattle's brief on the cross-appeal be stricken or disregarded.

Not having appealed from or assigned error to any trial court

rulings, Seattle has no legal right to ask the Court to reverse any part of the judgment against it, regardless of how the Court may rule on the appeals of Burien and Lake Forest Park. This is not because of some unusual or hyper-technical application of the procedural rules. There is probably no more basic appellate principle than the simple rule that in order to seek relief from a trial court judgment a party must file a timely notice of appeal or cross-appeal, or a notice of discretionary review. *See* RAP 5.1.

Here, Seattle did neither. Instead, it waited until its response to the Ratepayers' brief on the cross-appeal to argue, for the very first time in this Court, that if Burien and Lake Forest Park prevail on their appeals from the part of the judgment in Seattle's favor then Seattle should not have to comply with the part of the judgment in the Ratepayers' favor.[2]

In making that argument, Seattle mischaracterizes the Ratepayers' briefing to this Court and the posture of the issues in the trial court. The first sentence of Seattle's argument refers to this subject as "[a] procedural argument raised for the first time by plaintiffs in their cross-appeal." Sea. Br. at 6. That characterization is inaccurate. In their opening brief the Ratepayers separated their arguments in response to the appeals of Burien

[2] In its response to Burien and Lake Forest Park, Seattle said that if the Court agrees with those two cities that fire hydrant costs are properly chargeable to ratepayers then Seattle will revert to its prior practice of including those costs in water rates. Sea. Resp. to Bur./LFP at 7-8, 15. But Seattle said nothing about whether it should be relieved of its obligation to pay for previously incurred costs, *i.e.*, its obligation to comply with the trial court judgment ordering it to pay nearly $13 million for pre-2005 costs.

and Lake Forest Park from their arguments on the cross-appeal.[3] The point to which Seattle is referring was made at the outset of the Ratepayers' response to Burien and Lake Forest Park, in direct response to the latter city's "supplemental" conclusion requesting reversal of the trial court judgment "in its entirety." Ratepayers' Opening Br. at 17-18. The Ratepayers simply noted that (1) Burien and Lake Forest Park have no standing to appeal from the part of the judgment ordering Seattle to make refunds for pre-2005 costs, because the suburban cities are not "aggrieved parties" as to that part of the judgment, and (2) Seattle did not appeal from that part of the judgment and thus it is not at issue on this appeal.

The Ratepayers' briefing on their cross-appeal was strictly limited to the two issues raised by the cross-appeal regarding interest and the tax rate increase. Seattle's second brief submitted on this appeal should likewise have been limited to those two issues. The City's inaccurate statement that the argument made at pages 6-10 of its second brief is in response to an argument made by the Ratepayers "in their cross-appeal" is a transparent attempt to justify including in its brief an argument that is outside the scope of the cross-appeal.

Moreover, Seattle's argument that this situation falls within the

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[3] *See* Ratepayers' Opening Br., section IV ("Argument in Response to Burien and Lake Forest Park" at 17-33), *and* Ratepayers' Opening Br., section V ("Argument in Support of Ratepayers' Cross-Appeal" at 34-49).

"necessities of the case" exception in RAP 2.4(a)(2) is clearly incorrect.

RAP 2.4(a) provides, in pertinent part, that:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.[4]

Relief to a non-appealing party under the "necessities of the case" exception is granted only rarely and requires exceptional circumstances:

> In more than 60 years the Supreme Court has only twice, in narrow and unusual circumstances, invoked the "necessity of the case" to allow a party who did not file a notice of appeal to be joined with an appellant who did [citations omitted]. In each case, a trial court had entered judgment against co-defendants who had joint rights or duties concerning the same sum of money, and only one of them appealed. In each case the defendant who appealed achieved reversal on appeal, but by operation of law the reversal would not change the status quo as to the respondent unless the appellate court made the reversal effective in favor of the defendant who did not appeal as well as the defendant who did.

Genie Indus., Inc. v. Market Transp. Ltd., 138 Wn. App. 694, 708-09, 158

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[4] As Seattle points out (Br. at 7), the "necessities of the case" exception under RAP 2.4(a) is similar to the same exception under RAP 5.3(i): "If there are multiple parties on a side of a case and fewer than all of the parties on that side of the case timely file a notice of appeal or notice for discretionary review, the appellate court will grant relief only (1) to a party who has timely filed a notice, (2) to a party who has been joined as provided in this section or (3) to a party if demanded by the necessities of the case. The appellate court will permit the joinder on review of a party who did not give notice only if the party's rights or duties are derived through the rights or duties of a party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely filed a notice." (Emphasis added). Here, Seattle's duty to make reimbursement for pre-2005 fire hydrant costs is not "derived through" the rights or duties of the parties who did appeal (Burien and Lake Forest Park) and is not "dependent upon" the appellate court's determination of the suburban cities' rights or duties.

P.3d 1217 (2007) (emphasis added). Allowing a non-appealing party to seek relief from a judgment under the "necessities of the case" exception requires a showing of "absolute necessity" in order to give effect to the appellate court ruling as to the parties who did appeal. *Id.* at 709, 713-14. An absolute necessity is "one arising from the inherent nature of the case in that no judgment rendered could, under any circumstances, be valid as to one of the parties and not as to the others." *Id.*, citing *Morgan v. Williams*, 77 Wash. 343, 347, 137 P. 476 (1914).

Here, as in *Genie*, the "absolute necessity" test comes nowhere close to being met. If this Court were to conclude that Burien and Lake Forest Park are not obligated to reimburse SPU for fire hydrant costs (just as the trial court has already concluded that Shoreline, King County, and the Fire Districts are not obligated to pay SPU for such costs), that would not make it "absolutely necessary" to relieve Seattle from its own obligations to SPU and the utility ratepayers for pre-2005 costs.

Seattle's statement that it "could not have appealed the underlying judgment" (Br. at 8) is also incorrect. While it is true that Seattle had no reason to appeal from the part of the judgment on which it prevailed against Burien and Lake Forest Park, it certainly could have appealed from the part of the judgment it lost. Seattle opposed the Ratepayers' claim for refunds as to pre-2005 costs. The Ratepayers prevailed on that claim, and

Seattle could have appealed from that part of the judgment. But it failed to do so, and is now bound by that part of the judgment.

Similarly, there is no merit to Seattle's argument that it would be "absurd" or "wasteful" to require it to comply with the part of the judgment it lost but chose not to appeal from, if this Court were to rule in deciding the appeals of Burien and Lake Forest Park that ratepayers may be charged for fire hydrant costs. It has long been held that mere error of law by a lower court is not a sufficient basis to grant relief to a non-appealing party. *See, e.g., Morgan v. Williams*, 77 Wash. 343, 345-46, 137 P. 476 (1914) (successful appeal by sheriff's surety did not result in reversal of same claim against sheriff, where surety had appealed but sheriff had not); *Shreeder v. Davis*, 43 Wash. 129, 86 P. 198 (1906) (joint judgment against multiple defendants, though reversed as to one appealing defendant, remained in force as against defendants who did not appeal); *Genie, supra*, 138 Wn. App. at 707-16 (successful appeal by manufacturer resulting in reinstatement of claim against trucking company did not result in reinstatement of claim by marketer against trucking company, even though based on same contract and legal theory, where marketer did not appeal from dismissal of its claim).

This is the same principle that underlies the requirement set forth in RAP 2.4(a) and 5.3(i) that a party who seeks relief from a trial court

judgment must file a notice of appeal or a notice of discretionary review. Both rules are ultimately based on the importance of respecting the finality of judgments. As the court of appeals explained in *Genie*:

> While reaching the merits is indeed a strong policy, so is repose. It must be remembered that one of the most important services the courts provide is to bring legal disputes to an end. There are a variety of reasons why one party may choose to press an appeal while a similarly situated party decides to abide by the result at trial. Allowing Market a free ride to the appellate court on Genie's coattails would create a precedent undermining the finality of many judgments.
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> . . .
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> Market's failure to timely appeal precludes granting relief to Market from the order of October 28, 2005. System and the courts are entitled to rely on the finality of the judgment dismissing Market's cross-claim for indemnity from System.

138 Wn. App. at 715-16. Here, the parties and the courts are similarly entitled to rely on the finality of the part of the judgment requiring Seattle to make refunds for pre-2005 costs, since Seattle has not appealed from that or any other part of the judgment below.

B. Interest at the 12% Statutory Rate Is Payable on the Refunds for Pre-2005 Costs.

The sole ground relied upon by the trial court or offered by Seattle for denying an award of 12% statutory interest on the refunds for pre-2005 costs is sovereign immunity. In arguing against an award of 12% interest, Seattle (1) mischaracterizes the Ratepayers' argument for overturning the outdated *Spier* exception to the general waiver of sovereign immunity, (2)

fails to recognize the proprietary character of SPU's dealings with its utility customers, and (3) misconstrues and misapplies the holdings of *Architectural Woods, Our Lady of Lourdes* and *Carrillo*.

1. There is no good reason to treat liability for interest differently from liability for other kinds of obligations in deciding whether sovereign immunity has been waived.

Contrary to Seattle's characterization (Br. at 28), the Ratepayers did not argue that the doctrine of sovereign immunity was "judicially created" by this Court in *Spier v. Dep't of Labor & Indus.*, 176 Wash. 374, 29 P.2d 679 (1934). The Ratepayers are well aware that sovereign immunity has its roots in the common law dating back to the English monarchy. What *Spier* did in 1934 was to carve out liability for interest as something to be treated differently from liability for other kinds of obligations, in determining whether sovereign immunity has been waived. It is this exceptional treatment for interest liability that the Ratepayers contend is outdated and no longer serves any valid purpose.

In *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979), the Court reviewed at length the development of the law in this area. The Court noted that sovereign immunity was first used in this state as a bar to an award of postjudgment interest in *Spier*, a workmen's compensation case. 92 Wn.2d at 523-24. The Court went on to explain that since 1934 *Spier* had been cited in numerous kinds of cases as a basis

for denying interest on claims against public entities, even though sovereign immunity had been expressly or impliedly waived as to liability on the underlying obligations. *Id.* at 524-26. Neither in *Spier* itself nor in any of the subsequent cases relying on it did this Court or any other court offer any rationale for treating liability for interest differently from liability for the underlying obligation. The *Spier* decision's entire discussion of the interest issue is set forth in the footnote below.[5]

In its extensive review of sovereign immunity in our state, the Court in *Architectural Woods* explained that after *Spier* a number of decisions had gone too far, by holding that sovereign immunity could be waived only by express statutory enactments. 92 Wn.2d at 524-26. Overruling those decisions, the Court held that sovereign immunity from liability for interest could be waived by implication:

> However, we depart from those cases which have modified and qualified the rule of *Spier* to the point that it cannot be justly applied. It is our opinion that the consent to liability for interest which was required under the rule of *Spier* can be an implied consent, and is not limited to the express statutory or contractual consent, which was required by subsequent cases. It is our further opinion that by the act of entering into an authorized contract with a private party, the State, absent a

[5] "The judgment of the trial court carries interest at 6 per cent. The general rule is that the state cannot, without its consent, be held to interest on its debts. 15 R. C. L. 17; *Angarica v. Bayard*, 127 U. S. 251, 8 S. Ct. 1156, 32 L. Ed. 159; *United States v. North Carolina*, 136 U. S. 211, 10 S. Ct. 920, 34 L. Ed. 336. It is contended by respondent that the judgment is essentially not against the state. To this we cannot agree. The department of labor and industries is a state agency, exercising functions which, under the declarations of the Workmen's Compensation Act, are governmental." *Spier*, 176 Wash. at 376-77.

> contractual provision to the contrary, thereby waives its sovereign immunity in regard to the transaction and impliedly consents to the same responsibilities and liabilities as the private party, including liability for interest.

Id. at 526-27.

The Court said it agreed with the reasoning of courts in other states to the effect that if a government enters into contracts with private parties or enters into a business "ordinarily reserved to the field of private enterprise," then it "should be held to the same responsibilities and liabilities." *Id.* at 528-29. The Court went on to conclude:

> We consider this reasoning to be sound and to accord with principles of fairness. . . . Furthermore, our decision is harmonious with the reasoning of early cases of this court which expressed the principle that the State must not expect more favorable treatment than is fair between men in its business relations with individuals.
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> . . .
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> We therefore reverse the trial court's denial of interest to the plaintiff based on sovereign immunity and hold that any sovereign immunity possessed by Evergreen was waived by its entry into an authorized contract. We further hold that such waiver extended to every aspect of its contractual liability including liability for interest.

Id. at 529-30.

It is nothing short of astounding for Seattle to argue (Br. at 31-32) that the reasoning of the Court in *Architectural Woods* should be limited to situations where a specific public contract has been expressly authorized by statute. Any fair reading of the Court's unanimous opinion in that case

makes it clear that the Court's conclusion was based on the simple equity of treating a government entity like any other contracting party, and was not based on whether there was express statutory authorization for a specific contract. Rather, the Court held that by authorizing a government entity to enter into contracts generally, the mere act of entering into such a contract constitutes an implied waiver of sovereign immunity and subjects the government entity to liability to the same extent as a private party. This exposure includes liability for interest.

The present situation before the Court is this: No one has offered any good reason why, in determining whether sovereign immunity has been waived, liability for interest should be treated differently than liability for other kinds of obligations. Sovereign immunity has been waived, either expressly or impliedly, for virtually every other kind of obligation imaginable, whether for torts, or contracts, or workmen's compensation claims, or illegally exacted taxes. *See* discussion and cases cited in *Architectural Woods*, 92 Wn.2d at 524. If a governmental entity is otherwise liable to the same extent as a private party in a similar position, there simply is no good reason why that liability should not extend to liability for interest.

2. SPU's dealings with its customers are proprietary in nature, and thus are not subject to sovereign immunity in the first place.

Even if the Court declines to take this opportunity to discard the outdated and logically insupportable rule of *Spier*, the ratepayers are nevertheless entitled to 12% statutory interest on the refunds for pre-2005 costs. Seattle does not dispute the well established principle, which the trial court acknowledged (CP 2277) but then misapplied, that sovereign immunity does not apply to proprietary utilities. *See Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 615-16, 94 P.3d 961 (2004) (cities acting in proprietary capacity "are neither sovereign nor immune," quoting *Kelso v. City of Tacoma,* 63 Wn.2d 913, 916-17, 390 P.2d 2 (1964), and *Hutton v. Martin,* 41 Wn.2d 780, 252 P.2d 581 (1953)).[6]

Although the trial court recognized that SPU is a proprietary utility, it concluded that sovereign immunity was applicable because the underlying reason for the refunds was that providing fire hydrant service was a governmental function. CP 2277-78. While the trial court was correct that providing fire hydrants is a governmental function, the court's extension of that reasoning to hold that sovereign immunity bars the award of interest on the refunds owed to ratepayers missed a critical point.

[6] To same effect, see *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951); *Riddoch v. State*, 68 Wash. 329, 334, 123 P. 450 (1912); *Cunningham v. City of Seattle*, 42 Wash. 134, 137, 84 P. 641 (1906); *Sutton v. City of Snohomish*, 11 Wash. 24, 27, 39 P. 273 (1895); *Russell v. City of Tacoma*, 8 Wash. 156, 158-160, 35 P. 605 (1894).

The refunds are owed not because SPU provided fire hydrants but because it erroneously charged the ratepayers for the costs of that service. If the costs had been billed to the City's general fund as they should have been, no refunds would be owed to ratepayers. Thus, the refunds are owed not because SPU performed a governmental function, but because as a proprietary utility it improperly billed its customers for those costs.

Sending bills to utility ratepayers and receiving payments from them are activities performed by SPU in the course of its proprietary utility business, and therefore sovereign immunity does not apply to those activities. If SPU overcharges a ratepayer due to some computer or metering error and thus owes a refund to the ratepayer, sovereign immunity would not shield the utility from liability for interest. For the same reason, sovereign immunity does not shield the utility from liability for interest where the overcharge is due to improperly including fire hydrant costs in water rates. Since billing its customers is a part of SPU's proprietary business, any liability of the utility for overcharging its customers arises in the course of conducting its proprietary business and therefore is not subject to sovereign immunity.

If the money were owed in this case because of negligence in the way the City performed the governmental function of operating its fire hydrant system (as was alleged in *Stiefel v. City of Kent*, 132 Wn. App.

523, 132 P.3d 1111 (2006)), then the doctrine of sovereign immunity would be implicated and the question would be whether such immunity had been waived. But since the money is owed in this case because the proprietary utility overcharged its customers by billing them for fire hydrant costs, the doctrine of sovereign immunity is not implicated at all.

3. Seattle misconstrues and misapplies the holdings of *Architectural Woods*, *Our Lady of Lourdes* and *Carrillo*.

As explained above, Seattle has misconstrued *Architectural Woods* in arguing that where a contract is concerned, sovereign immunity is waived only if the specific contract has been expressly authorized by a statute. Sea. Br. at 32-33. The Court held in *Architectural Woods* that, as a matter of fundamental fairness, a governmental entity impliedly waives sovereign immunity simply by entering into any authorized contract. 92 Wn.2d at 527, 529-30.

Seattle also argues, erroneously, that a legislative waiver of sovereign immunity must be done "explicitly" (Br. at 32), and that the "implied waiver" principle is limited to waiver by contract (*id.* at 33). That is contrary to the Court's explicit holding in *Architectural Woods*:

> It is our opinion that the consent to liability for interest . . . can be an implied consent, and is not limited to the express statutory or contractual consent [required by various cases subsequent to *Spier*].

92 Wn.2d at 526 (emphasis added). Thus, the consent to be held liable for

interest can be express or implied, either by statute or by contract.

In the instant case, SPU's consent to be held liable for interest is implied both by contract and by statute. As explained in the our opening brief at pages 40-41, SPU enters into a bilateral contract with each ratepayer pursuant to which the utility promises to provide utility services and the ratepayer promises to pay for them. *See* Seattle Municipal Code §§ 21.04.020, .030 & .040 (CP 2006-08), describing the terms of the contracts between SPU and its ratepayers. By entering into those contracts SPU has impliedly waived sovereign immunity and has consented to be held liable for interest as to its obligations under those contracts. By overcharging ratepayers by including pre-2005 fire hydrant costs in the water rates, SPU has subjected itself to liability for interest on the refunds.

Likewise, although interest is not mentioned explicitly in the statute, by enacting RCW 80.04.440 providing that a "public service company" such as SPU is liable "for all loss, damage or injury" resulting from any prohibited, forbidden or unlawful acts, the legislature has impliedly waived any sovereign immunity of SPU as to such acts. Thus, SPU is subject to liability for interest to the same extent as any non-governmental utility would be. *See* Ratepayers' Opening Br. at 39-40.

As noted in our opening brief at pages 38-39, the decision in *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961

(2004), squarely supports the Ratepayers' claim for statutory 12% prejudgment and postjudgment interest on the refunds for pre-2005 costs. Seattle's criticism of *Carrillo* as "curious" and "flatly inconsistent" with *Our Lady of Lourdes Hospital v. Franklin County*, 120 Wn.2d 439, 842 P.2d 956 (1993) (Sea. Br. at 35-37), is unwarranted. In *Our Lady of Lourdes* the Court merely cited the *Spier* "general rule" and held that a county was not liable for interest on a hospital's claim for recovery of medical costs for county jail inmates, because the hospital did not point to a statute or contract authorizing such interest and did not try to show implied consent to liability for interest. 120 Wn.2d at 455-56.

In *Carrillo* the court of appeals began its analysis by citing the "general rule" that the "state cannot, without its consent, be held to interest on its debts." 122 Wn. App. at 615. However, unlike Seattle, the court did not end its analysis at that point. The court described Washington's long-standing rule that a municipal corporation has the same sovereign immunity as the state for its governmental functions but does not have sovereign immunity for its proprietary functions. *Id.* at 615-16. Next, the court explained that the City of Ocean Shores (like Seattle here) simply relied on the statement of the "general rule" cited in *Architectural Woods* and *Our Lady of Lourdes Hospital*, but (1) under *Architectural Woods*

consent to be held liable for interest is implied where a governmental entity enters into a contract, and (2) in *Our Lady of Lourdes* the county was acting on behalf of the state (*i.e.*, was performing a governmental function) in arranging to provide hospital care for jail inmates on behalf of the state. *Id.* at 616. The *Carrillo* court explained that Ocean Shores had "not shown that it was engaged in an activity on behalf of the state, as required by *Kelso* (and was the case in *Our Lady of Lourdes*)," and cited prior Washington cases allowing interest on refunds from cities and counties. *Id.* at 616-17. It concluded that "sovereign immunity does not excuse the City from pre- and post-judgment interest for its collection of an illegal tax." *Id.*

Thus, the result in *Carrillo* was not some aberrant departure from long-standing Washington law, as Seattle would have the Court believe. *Carrillo* was squarely based upon and fully consistent with a long line of Washington decisions, dating back virtually to the earliest years of the state's existence, which distinguished between governmental and proprietary functions and held that the doctrine of sovereign immunity has no application to a municipality's proprietary functions.[7]

[7] In the trial court Seattle suggested that the *Carrillo* court's analysis of the interest question was superficial because its discussion was set out on (only) three pages. CP 2011. In contrast, the Court's entire discussion of the interest question in *Our Lady of Lourdes*, upon which Seattle relies so heavily, was contained in a single paragraph.

C. Because the Admitted Purpose of the January 1, 2005 Water Utility Tax Rate Increase Was to Continue Imposing Fire Hydrant Costs on Ratepayers, the Tax Increase Was Invalid.

Seattle and the Ratepayers evidently agree on the basic legal principles governing whether the increased water utility tax is valid. The Ratepayers do not dispute that Seattle has authority to impose a water utility tax. Seattle does not dispute that the Ratepayers have standing to challenge the validity of the tax rate increase. Sea. Br. at 12 n.5, 23. Nor does Seattle dispute the proposition that "tax increases cannot be for an unlawful purpose or have an unlawful effect." *Id.* at 23-24.[8] Further, Seattle apparently agrees that costs of general government functions are to be paid by the general government rather than by a proprietary utility or its ratepayers. That was the very reason Seattle gave for changing the way it paid for fire hydrants following *Okeson I.* Sea. Resp. to Bur./LFP at 1, 4.

Nor is there any dispute about the facts. Seattle candidly admits that the January 1, 2005 water utility tax rate increase was for the purpose of "holding Seattle's general fund harmless from the court's decision in *Okeson*" (CP 2470) by continuing to impose fire hydrant costs on water ratepayers in the form of the higher water utility tax.

The question before the Court is whether, in light of these agreed legal principles and the admitted purpose of the January 1, 2005 tax rate

[8] The trial court, too, agreed on both these points. RP 5, 6 (2-13-07).

increase, Seattle will be permitted to continue imposing the expenses of a general government function solely on utility ratepayers. For that is exactly what is occurring in this case. The fire hydrant costs, which benefit the entire general public, are still being borne entirely by water ratepayers. The only thing that changed as of January 1, 2005 was that the dollars being paid by the ratepayers for fire hydrant costs were relabeled as being for utility taxes instead of for utility operational expenses. Running those dollars through the general fund in the form of higher utility taxes before they are handed right back to the utility as payment for hydrant costs is simply a form of money laundering.

As numerous cases have stressed, "courts are vigilant in guarding against sham transactions," *Goolsby v. Blumenthal*, 590 F.2d 1369, 1372 n.13 (5th Cir. 1979). Courts "have consistently refused to exalt artifice over reality or to ignore the actual substance of a particular set of transactions," *Mathews v. Massell*, 356 F. Supp. 291, 300 (N.D. Ga. 1973) (discussed in Ratepayers' Opening Br. at 47-48).[9] Here, Seattle has openly admitted the purpose of the arrangement at issue. In *Mathews*, the City of Atlanta admitted that the federal revenue sharing funds were being

[9] See additional cases cited in *Mathews*, 356 F. Supp at 299-300 nn.7, 8, 9, and Washington cases to same effect cited in Ratepayers' Opening Br. at 48 n.24, including *Sullivan v. White*, 13 Wn. App. 668, 670-71, 536 P.2d 1211 (1975) ("test of substance over form has been uniformly applied in this State").

deposited into the city's general fund in order to "free up" funds to be used to reduce utility rates, a purpose not allowed for revenue sharing funds. Similarly, Seattle has admitted that the real purpose of the increased water utility tax is to pay for fire hydrants, *i.e.*, to require the utility to pay the City the same amount that the City returns to the utility for fire hydrants. The purpose and effect of the arrangement is to continue imposing fire hydrant costs on the utility and its ratepayers, in purposeful defiance of *Okeson*'s fundamental holding. What could be a more obvious sham?

Seattle makes essentially four arguments in an attempt to justify this arrangement. None of them has any merit.

First, Seattle argues that since it has authority to impose a utility tax on SPU, there are no limits on how it can use those tax revenues, citing *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 435 P.2d 975 (1968), and *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991). Sea. Br. at 15-16. But Seattle's conclusion does not follow, and neither *Namer* nor *American Legion* supports Seattle's position.[10] Once Seattle concedes, as it has done in this

[10] *Namer* supports the Ratepayers' position, not Seattle's. It states that a court will not sustain a tax unless it is "reasonably related to some valid public and legislative purpose." 73 Wn.2d at 7. A tax that is enacted (or, as here, increased) for an unlawful purpose is not "reasonably related to a valid public and legislative purpose" and therefore will not be sustained by a Washington court. In *American Legion*, the plaintiff claimed that the city was not using gambling tax receipts "primarily" for enforcement of the gambling act, as required by the authorizing statute. The Court held that under that statute the word

case,[11] that a tax increase enacted for an unlawful purpose is invalid, it makes no sense to argue that the increased tax revenues can be used for the designated unlawful purpose.

Second, Seattle argues that the purpose of the tax increase – to pay for 100% of the fire hydrant costs – cannot be deemed unlawful because (1) the utility tax revenues are commingled with other revenues in the general fund before being used to pay for fire hydrant costs, and (2) even without the tax increase some portion of utility taxes would be used, along with other general fund revenues, to help pay for fire hydrant expenses (as well as other general government expenses). Sea. Br. at 17, 23. Again, neither part of that argument makes sense. If the tax increase was for an improper purpose in the first place, then commingling the tax revenues with other general revenues would not cleanse any impropriety. Nor does the fact that it is perfectly proper to impose some tax on the utility, to be added to other general revenues to pay for general government expenses, mean that it is therefore okay to impose the entire burden of a particular general government expense on a proprietary utility or its ratepayers. Yet

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"primarily" meant merely "in the first instance," and that the city was, in fact, using the tax receipts "primarily" for the designated purpose and that the other uses of the tax proceeds were also related to gambling enforcement. 116 Wn.2d at 11.

[11] "Seattle does not dispute this general rule [that tax increases must be for a lawful purpose]." Sea. Br. at 11-12. Seattle has no choice but to concede that rule. *See* Wash. Const. art. VII, §5: "No tax shall be levied except in pursuance of law." While the phrase "pursuant to law" might mean in accordance with lawful procedure, the phrase "in pursuance of law" must mean, at a minimum, for a lawful purpose.

that is exactly what Seattle is doing here.

Third, Seattle argues that accepting the Ratepayers' "theory" would create "insurmountable" problems, requiring judicial supervision of all aspects of state, county and municipal taxation. Sea. Br. at 22-23. That is absurd. It is like saying that if a court were to hold a driver liable for entering an intersection against a red light or for driving negligently, then the court would have to supervise all driving.[12]

Finally, Seattle argues that the Ratepayers could have sought to overturn the tax increase through the right of referendum. Sea. Br. at 26. But that is no argument at all. The ballot box may provide an alternative remedy for citizens who believe they are being injured by unlawful acts of government, but it is not the only remedy. One of the primary functions of the courts is to provide a check on governmental misconduct. That is precisely what the Ratepayers are seeking here.

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[12] As the courts pointed out in *Riggs v. Township of Long Beach*, 538 A.2d 808, 813-14 (N.J. 1988), and *Mathews, supra,* 356 F. Supp. at 302, there is an important distinction between (1) inquiring into legislators' minds to try to ferret out their true motives and unexpressed, subjective intentions, and (2) addressing the purpose of the legislation in question when that purpose is made explicit in the legislation itself or in accompanying documents. When the legislative purpose has been expressly stated, courts will not hesitate to strike down legislation having an unlawful purpose. *Riggs*, 538 A.2d at 813-14. Although problems of proof as to legislative purpose may arise in other situations, where an unlawful legislative purpose has been clearly proven, there is no reason why the court should not act on that proof by striking down the legislation. *Mathews*, 356 F. Supp. at 302.

The Court should not allow Seattle to subvert the rule of *Okeson* by means of the sham arrangement put in place by the City on January 1, 2005 for the admitted purpose of continuing to impose fire hydrant costs on SPU and its ratepayers. To permit this subversion would be "to exalt artifice over reality" and "to ignore the actual substance of a particular set of transactions." It would also undermine a basic tenet of municipal law: that the expenses of a general government function must be borne by the general government rather by a proprietary utility or its ratepayers. That is the fundamental principle lying at the heart of the *Okeson* trilogy, including not only this Court's unanimous decision in *Okeson I* on streetlights, but also the court of appeals decision in *Okeson II* (130 Wn. App. 814, 125 P.3d 172 (2005), holding that expenses of public art unrelated to utility business cannot be imposed on utility or its ratepayers), and this Court's decision last year in *Okeson III* (159 Wn.2d 436, 150 P.3d 556 (2007), holding that "combating global warming is a general government purpose, . . . and . . . [t]herefore, such . . . expenses must be borne by general taxpayers rather than utility ratepayers," *id.* at 439).[13]

The harm that would result if Seattle were allowed to get away with

[13] The Court was narrowly divided in *Okeson III*, but the issue dividing the Court was whether the expenses in question were for a general government purpose or a utility purpose. There was no division of opinion on the fundamental principle that general government expenses must be borne by the general government. Here, Seattle candidly admits that under the reasoning of *Okeson I* the fire hydrant expenses in question are for general government purposes.

its scheme to continue making ratepayers pay for fire hydrants would go far beyond contravening this particular principle of municipal law. We respectfully submit that allowing Seattle to get away with this would diminish the rule of law in our state. We would have the spectacle of our state's largest city saying in effect to this Court and to the public that "we realize the Court has told us that costs like these should not be imposed solely on utility ratepayers but we are going to keep doing it anyway." We should expect more than this from our public officials.

III. CONCLUSION

For the foregoing reasons, Seattle is bound by the part of the trial court judgment requiring it to make refunds for pre-2005 fire hydrant costs. The ratepayers are entitled to interest on those refunds at the statutory 12% rate. Seattle's January 1, 2005 water utility tax rate increase should be declared invalid, and the case should be remanded to the trial court for further proceedings consistent with the decision of this Court.

Respectfully submitted this 22nd day of January, 2008.

HELSELL FETTERMAN LLP

By _____
David F. Jurca, WSBA #2015
Jennifer S. Divine, WSBA #22770
Connie K. Haslam, WSBA #18053
Attorneys for Respondents/Cross-Appellants Lane, *et al.* (Ratepayers)